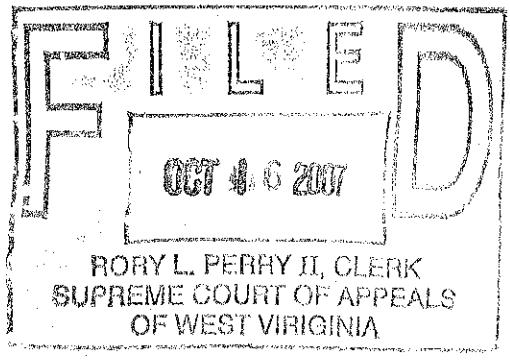
WEST VIRGINIA SUPREME COURT OF APPEALS

No. ~~070854~~
33524



ELIZABETH A. SEDLOCK and
JASON BANISH,

Plaintiffs Below, Appellants herein,

vs.

MARSHA ANN FELTON,
JEAN HOLLANDSWORTH,
DOUBLE H. REALTY, INC.,
which is a West Virginia corporation,
DAVID A ROMANO and
CATHY JOEY ROMANO,

Defendants below, Appellees herein.

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

APPELLANTS' BRIEF

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THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is Rule 54 Appeal of an Order entered on 24th day of October, 2006, by the Circuit Court of Harrison County, West Virginia, in a civil action against appellants' real estate agent, agency, and broker, the appellees, concerning the sale of Elizabeth Sedlock's (an appellant) former home at 601 Indiana Avenue, Nutter Fort, West Virginia. The Circuit Court of Harrison County, West Virginia, granted a motion to dismiss the appellees and made such immediately appealable under Rule 54(b) of the West Virginia Rules of Civil Procedure. In a matter that does not relate to the case now before this Court, the appellants settled with the Romanos, who listed to sell 339 Worley Avenue, Clarksburg, West Virginia, and who had breached their contract to sell 339 Worley Avenue, Clarksburg, West Virginia to the appellants.

STATEMENTS OF FACTS

As will be more detailed below, the complaint alleged that Elizabeth Sedlock, an appellant, owned 601 Indiana Avenue, Nutter Fort, West Virginia, and listed the same for sale with appellees herein, on February 18, 2004, which was to expire August 18, 2004. Elizabeth Sedlock, an appellant, entered into a contingent purchase offer agreement on March 29, 2004, with the Moyles, whose names were erroneously left on the complaint, but were never served, to sell them 601 Indiana Avenue, Nutter Fort, West Virginia, with a closing date of May 29, 2004, but a 15 day extension was written in. The contingency was that Elizabeth Sedlock would not be bound to sell her realty unless she located acceptable housing on or before June 15, 2004. She did not locate acceptable housing on or before June 15, 2004.

As will be more detailed below, the complaint also alleged that appellants on June 26,

2004, signed a contingent purchase offer agreement with the Romanos to purchase 339 Worley Avenue, Clarksburg, West Virginia. A contingency was the sellers ". . . closing on the sale of their home at 601 Indiana Ave, Nutter Fort, WV 26301 prior to the closing date on 339 Worley Ave., Clarksburg, WV 26301." Within days Mrs. Romano advised Elizabeth Sedlock, an appellant, that Mr. Romano previously reneged on a purchase offer agreement. Elizabeth Sedlock, an appellant, brought this to the attention of Marsha Ann Felton, an appellee, and requested that she determine if it was true. Marsha Ann Felton reported to Elizabeth Sedlock that it was true. Elizabeth Sedlock told Marsha Ann Felton she would not sell 601 Indiana Avenue, Nutter Fort, West Virginia, unless a sale was completed for 339 Worley Avenue, Clarksburg, West Virginia. Marsha Ann Felton said she could not blame Elizabeth Sedlock.

On or about June 26, 2004, Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., contacted Joann E. Moyle to determine if they were still interested in purchasing 601 Indiana Avenue, Nutter Fort, WV 26301, which they were, though it meant possibly losing earnest money on another house they had days before made an offer to purchase. (The complaint was dismissed as to appellees prior to any depositions being taken. Appellants designated the entire record on or about February 23, 2007. Appellants proceeded with taking depositions after the appellees were dismissed. Thomas Moyle's deposition was taken April 20, 2007. Appellants settled with the Romanos at a mediation on June 1, 2007. The transcript of Thomas Moyle's deposition was filed on or about July 25, 2007, with the Circuit Court of Harrison County, West Virginia. Appellants filed a motion to amend the complaint with this Court, since the case had been dismissed by the Circuit Court of Harrison County, West Virginia, [and all that was then left of the case was a petition to appeal pending before this court] to add a

paragraph 13.1, which was an outgrowth of Thomas Moyle's deposition and which was proposed to state as follows:

> 13.1 Thomas L. Moyle told Marsha Ann Felton that unless the 'finding suitable house contingency' was removed from Exhibit 5, that he would not be interested in signing another purchase offer agreement for the realty of Elizabeth A. Sedlock at 601 Indiana Avenue, Nutter Fort, WV 26301.)

As will be more detailed below, the complaint alleged that thereafter, on July 5, 2004, the Moyles and Elizabeth Sedlock entered into another purchase offer agreement. At the time of the execution of the purchase offer agreement with the Moyles, Elizabeth Sedlock said to Marsha Ann Felton that she would not sell 601 Indiana Avenue, Nutter Fort, West Virginia, unless a sale was completed for 339 Worley Avenue, Clarksburg, West Virginia, and Marsha Ann Felton represented that the same contingencies were in the July 5, 2004, purchase offer agreement with the Moyles that were in the March 29, 2004, purchase offer agreement with the Moyles. On August 17, 2004, Marsha Ann Felton advised Elizabeth Sedlock that David Romano said he was not selling 339 Worley Avenue, Clarksburg West Virginia, and that the appellants should sue her and some of the other parties to this litigation. On August 18, 2004, Marsha Ann Felton advised Elizabeth Sedlock that the home purchase contingency was not in the July 5, 2004, purchase offer agreement with the Moyles and that Marsha Ann Felton was aware that Elizabeth Sedlock was not willing to sell her home if the contract of sale fell through with the Romanos for appellants purchasing 339 Worley Avenue, Clarksburg West Virginia.

The Court states the following facts:

The trial court made the following findings of fact:

> 1. 2004, Marsha Ann Felton was a West Virginia licensed real estate salesperson and Jean Hollandsworth was a licensed West Virginia broker. At that

time Ms. Hollandsworth was also an officer in the corporation, Double H. Realty, Inc. ("Double H Realty"). Double H Realty retained Ms. Felton as a real estate salesperson.

2. On February 18, 2004, Ms. Felton obtained an exclusive listing agreement from owner, Elizabeth A. Sedlock(,) for 601 Indiana Avenue, Nutter Fort, West Virginia, 26301. Ms. Felton showed the Indiana Avenue house to Joann E. Moyle and Thomas L. Moyle. On March 29, 2004, Ms. Felton drafted a "Contract for Sale and Purchase" for the sale of Ms. Sedlock's Indiana Avenue house to the Moyles. Included in this contract was a clause making the performance of the contract "contingent upon the seller locating acceptable housing."

3. On June 26, 2004, Ms. Sedlock and Mr. Banish entered into a contract to purchase another home. The contract entered into by Plaintiffs for the purchase of the 339 Worley Avenue house owned by David A. Romano and Cathy Joey Romano expressly conditioned the sale upon "buyers closing on the sale of their home at 601 Indiana Avenue, Nutter Fort, WV 26301 prior to the closing date on the 339 Worley Ave., Clarksburg, WV 26301." The offer made by Mr. and Mrs. Moyle to purchase Sedlock's home on Indiana Avenue had expired.

The appellants have no objections to such findings by the trial court.

The trial court also made the following findings of fact:

4. The Moyles executed a new offer to purchase Sedlock's Indiana Avenue home on July 5, 2004. The "contract for Sale and Purchase" of Sedlock's home on Indiana Avenue to Mr. and Mrs. Moyle, was drafted for Sedlock's approval. The prior contract's contingency regarding acceptable housing had been fulfilled. Plaintiffs had located acceptable housing and entered into a contract for its purchase. Plaintiffs' ability to obtain financing to purchase the Worley Avenue house was contingent upon Ms. Sedlock first selling her house located on Indiana Avenue. The contingency clause regarding locating acceptable housing was not included in the draft of the contract dated July 5, 2004.

5. Ms. Sedlock read the contract, inquired about the contingency's absence, accepted the contract as drafted, and executed the contract on July 5, 2004. Ms. Sedlock initialed and signed the contract acknowledging that she read and understood the provisions and agreed to sell her house at the price, terms, and conditions set forth, and she was not relying upon any oral statements or representations made by the Purchaser, a real estate broker, or agent that were not in the contract.

The appellants have objections to those findings of fact by the trial court because it omits some material facts that were set forth in the plaintiffs' complaint, which stated as follows:

19. Cathy Joey Romano called Elizabeth A. Sedlock between June 26, 2004, and July 3, 2004, and advised that David A. Romano had previously backed out of a sale of 339 Worley Avenue, Clarksburg, WV 26301, he would not take less than $120,000.00, and Elizabeth A. Sedlock was not to tell her agent she called her, as she knew she was not allowed to call her. Without identifying her source, Elizabeth A. Sedlock called Marsha Ann Felton to see if it were true that David A. Romano had previously backed out of a sale of 339 Worley Avenue, Clarksburg, WV 26301; Marsha Ann Felton agreed to check such out with Beth Taylor; Marsha Ann Felton called back and reported it was true, but Beth Taylor said she would sue the Romanos, if they backed out and she had previously won such a suit. Elizabeth A. Sedlock told Marsha Ann Felton that she would not sell 601 Indiana Avenue, Nutter Fort, WV 26301, unless the sale was completed for 339 Worley Avenue, Clarksburg, WV 26301; Marsha Ann Felton said she understood and could not blame Elizabeth A. Sedlock.

20. **Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., prepared a "Contract for Sale and Purchase" dated July 5, 2004, for 601 Indiana Avenue, Nutter Fort**, West Virginia, that was executed by Joann E. Moyle and Thomas L. Moyle with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the selling company, and Elizabeth A. Sedlock with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the listing company. (See Exhibit 8 [that was attached to the complaint], which is incorporated herein by reference, as if fully set forth herein).

21. **At the time that Elizabeth A. Sedlock executed the "Contract for Sale and Purchase" dated July 5, 2004, that was executed by** Joann E. Moyle and Thomas L. Moyle with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the selling company, and **Elizabeth A. Sedlock with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the listing company, Marsha Ann Felton represented it had the same provisions as the previous one (i.e., March 29, 2004** [See Exhibit 5 [that was attached to the complaint], which is incorporated herein by reference, as if fully set forth herein]). Again, Elizabeth A. Sedlock told Marsha Ann Felton that she would not sell 601 Indiana Avenue, Nutter Fort, WV 26301, unless the sale was completed for 339 Worley Avenue, Clarksburg, WV 26301; again, Marsha Ann Felton said she understood.

(Paragraphs 22-36 of the complaint detailed the numerous means that Cathy Joey Romano and/or David A. Romano used to try to avoid having to sell the real estate to appellants).

37. On August 17, 2004, Bill Pulice called Elizabeth A. Sedlock and said the house was now approved for coverage and that Elizabeth A. Sedlock could come in and pay by August 19, 2004, since the real estate closing for 339 Worley Avenue, Clarksburg, WV 26301, was set for August 20, 2004. At 4:45 .p.m, (sic) on August 17, 2004, Elizabeth A. Sedlock and Jason Banish were having dinner at the home of Mary Sedlock-Janes, across the street from her house. The cell

phone of Elizabeth A. Sedlock rang. It was Marsha Ann Felton, she wanted Elizabeth A. Sedlock and Jason Banish to come to her office. Elizabeth A. Sedlock told her Jason Banish was just about to go home and get dressed for work. Elizabeth A. Sedlock asked her if something was wrong. Marsha Ann Felton she said she needed to talk to Elizabeth A. Sedlock and Jason Banish in person. Elizabeth A. Sedlock again told her Jason Banish was going to work and Elizabeth A. Sedlock and Jason Banish both couldn't come to the office and to just go ahead and tell Elizabeth A. Sedlock what was wrong. Marsha Ann Felton proceeded to tell Elizabeth A. Sedlock that David Romano had left a message on Beth Taylor's voice mail saying he was not going to sell his home. Elizabeth A. Sedlock told Marsha Ann Felton to bring Elizabeth A. Sedlock a copy of all the paper work involved in this case to the house of Elizabeth A. Sedlock. Approximately 2 hours later, Marsha Ann Felton arrived at the home of Elizabeth A. Sedlock. Marsha Ann Felton was sobbing, being very apologetic, and told Chuck Banish, Anita Banish, Mary Sedlock-Janes, George Janes, Elizabeth A. Sedlock, and Jason Banish that Elizabeth A. Sedlock and Jason Banish should sue her, Century 21, Beth Taylor, David A. Romano, and Cathy Joey Romano. Marsha Ann Felton stated that she, Century 21, and Beth Taylor had insurance (and that is what the insurance is for); that this should never happen to anyone again, and that sometimes it takes a lawsuit to make a new law to protect the buyer. Marsha Ann Felton was going to wait until after Elizabeth A. Sedlock's meeting with the lawyer for Elizabeth A. Sedlock and Jason Banish on the morning of August 18, 2004, to see what happened before going to tell Thomas Moyle and Joann Moyle.

38. On August 18, 2004, Marsha Ann Felton told Elizabeth A. Sedlock that David A. Romano already had a lawyer and was absolutely not selling his home. Elizabeth A. Sedlock told her to explain to Thomas Moyle and Joann Moyle what David A. Romano did and that Elizabeth A. Sedlock had already met with an attorney to see what could legally be done. Elizabeth A. Sedlock also asked her to change the closing with Thomas Moyle and Joann Moyle to August 20, 2004, at the same time Elizabeth A. Sedlock and Jason Banish were scheduled to close with David A. Romano and Cathy Joey Romano. Elizabeth A. Sedlock wanted this done just in case David A. Romano and Cathy Joey Romano showed up in an attempt to say that Elizabeth A. Sedlock and Jason Banish were in breach of their contract with them. Marsha Ann Felton said she would do this and get back to Elizabeth A. Sedlock. In less than an hour, Marsha Ann Felton called Elizabeth A. Sedlock back and said that Dan Baker, Elizabeth A. Sedlock's closing attorney, had cancelled our (sic) closing due to David A. Romano not releasing the necessary information needed to close, so there was no need for Elizabeth A. Sedlock and Jason Banish to show up on Friday, August 20, 2004. Marsha Ann Felton said Mr. Baker was going to draft a letter stating the reason for the cancellation. Marsha Ann Felton told Elizabeth A. Sedlock that she would call Elizabeth A. Sedlock after she and her Broker returned from meeting with Thomas Moyle and Joann Moyle.

39. On August 18, 2004, at approximately 7:30 p.m., Marsha Ann Felton arrived at the home of Elizabeth A. Sedlock. She was very calm and soft spoken. Elizabeth A. Sedlock invited Marsha Ann Felton into her home. They sat at the dining room table. Marsha Ann Felton said, "The Moyles wanted me to tell you to be ready on the 28th, they are moving in with you." Marsha Ann Felton also said that they were going to get the best lawyer that money could buy and sue Elizabeth A. Sedlock for breaking the contract. Elizabeth A. Sedlock then told Marsha Ann Felton that she did not break the contract, and that she was not moving, if she did not buy a home. **Marsha Ann Felton then told Elizabeth A. Sedlock, that home purchase contingency was not in the second contract with Thomas Moyle and Joann Moyle that Elizabeth A. Sedlock signed on July 5, 2004. Elizabeth A. Sedlock told Marsha Ann Felton that she was led to believe by Marsha Ann Felton that the second contract was the same as the first with only the dates being changed. Elizabeth A. Sedlock then asked her why she did not add that in the second contract. Marsha Ann Felton said she didn't add it because Elizabeth A. Sedlock and Jason Banish already had a home to purchase. Marsha Ann Felton also admitted that she knew Elizabeth A. Sedlock was not willing to sell her home if the contract fell through with David A. Romano and Cathy Joey Romano. Elizabeth A. Sedlock then asked Marsha Ann Felton again if she had relayed this information to Thomas Moyle and Joann Moyle.** Marsha Ann Felton adamantly admitted that she had told Thomas Moyle and Joann Moyle that Elizabeth A. Sedlock would not sell if she did not purchase the property at 339 Worley as Elizabeth A. Sedlock had asked her to do. Marsha Ann Felton stated that Thomas Moyle and Joann Moyle had been aware from March 30, 2004, that Elizabeth A. Sedlock would not sell if she did not have a home to purchase. (Bold face added and language added "that was attached to the complaint" after the exhibit numbers).

The trial court also made the following finding of fact:

6. On or about August 19, 2004, Mr. and Mrs. Romano notified Beth Taylor, their real estate salesperson, that they would not sell their house to Sedlock and Banish as was provided for in the June 26, 2004 contract. Ms. Sedlock chose at that time not to attempt to enforce the contract that she had entered into for the purchase of the Romano's house. Ms. Sedlock wanted to maintain her house on Indiana Avenue. The Moyles enforced the contract requiring Ms. Sedlock to sell her house.

The appellants have no objections to that finding of fact by the trial court.

Appellants asserted the following causes of action against Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth:

FIRST CAUSE OF ACTION-BREACH OF CONTRACT BY MARSHA ANN FELTON, DOUBLE H REALTY, INC., AND JEAN HOLLANDSWORTH

46. Plaintiffs incorporate by reference paragraphs 1-45 of the complaint by reference, as if fully set forth herein.

47. Marsha Ann Felton, breached her verbal agreement with Elizabeth A. Sedlock to include in the purchase offer agreement that it was contingent upon her ". . . locating acceptable housing. . . ."

48. Double H Realty, Inc., is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of respondeat superior, as the activities of Marsha Ann Felton were as an employee of Double H Realty, Inc., Marsha Ann Felton's actions were within the scope of her employment, Double H Realty, Inc., selected and engaged Marsha Ann Felton in her employment, Double H Realty, Inc., paid Marsha Ann Felton compensation, Double H Realty, Inc., had the power to dismiss Marsha Ann Felton, and Double H Realty, Inc., had the power of control over Marsha Ann Felton.

49. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of agency because omissions of Marsha Ann Felton were done within the scope of her duties, Marsha Ann Felton performed services for Jean Hollandsworth under an express or implied agreement, Marsha Ann Felton was subject to the control or right to control the manner and means of Marsha Ann Felton performing the services, and Marsha Ann Felton was acting within the scope of authority which were expressly or impliedly assigned to the agent by Jean Hollandsworth.

50. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of respondeat superior as the activities of Marsha Ann Felton were as an employee and/or agent of Jean Hollandsworth, Marsha Ann Felton's actions were within the scope of her employment, Jean Hollandsworth selected and engaged Marsha Ann Felton in her employment, Jean Hollandsworth paid Marsha Ann Felton compensation, Jean Hollandsworth had the power to dismiss Marsha Ann Felton, and Jean Hollandsworth had the power of control over Marsha Ann Felton.

51. Elizabeth A. Sedlock was damaged by Marsha Ann Felton, Double H Realty, Inc., and and (sic) Jean Hollandsworth as set forth in paragraph 45 herein.

Wherefore, Elizabeth A. Sedlock demands judgment against Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth for a fair, just and reasonable amount of damages, interest, and costs. Elizabeth A. Sedlock demands a trial by jury.

SECOND CAUSE OF ACTION-NEGLIGENCE OF MARSHA ANN FELTON, DOUBLE H REALTY, INC., AND JEAN HOLLANDSWORTH

52. Plaintiffs incorporate by reference paragraphs 1-45 of the complaint by reference, as if fully set forth herein.

53. Marsha Ann Felton owed Elizabeth A. Sedlock and Jason Banish duties specified in paragraph 4 hereof, which she breached by failing to include in the purchase offer agreement that it was contingent upon her ". . . locating

acceptable housing. . . .", which Marsha Ann Felton represented by words and/or actions that she had included.

54. Double H Realty, Inc., is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of respondeat superior, as the activities of Marsha Ann Felton were as an employee of Double H Realty, Inc., Marsha Ann Felton's actions were within the scope of her employment, Double H Realty, Inc., selected and engaged Marsha Ann Felton in her employment, Double H Realty, Inc., paid Marsha Ann Felton compensation, Double H Realty, Inc., had the power to dismiss Marsha Ann Felton, and Double H Realty, Inc., had the power of control over Marsha Ann Felton.

55. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of agency because omissions of Marsha Ann Felton were done within the scope of her duties, Marsha Ann Felton performed services for Jean Hollandsworth under an express or implied agreement, Marsha Ann Felton was subject to the control or right to control the manner and means of Marsha Ann Felton performing the services, and Marsha Ann Felton was acting within the scope of authority which were expressly or impliedly assigned to the agent by Jean Hollandsworth.

56. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the breach of contract by Marsha Ann Felton under the theory of respondeat superior as the activities of Marsha Ann Felton were as an employee and/or agent of Jean Hollandsworth, Marsha Ann Felton's actions were within the scope of her employment, Jean Hollandsworth selected and engaged Marsha Ann Felton in her employment, Jean Hollandsworth paid Marsha Ann Felton compensation, Jean Hollandsworth had the power to dismiss Marsha Ann Felton, and Jean Hollandsworth had the power of control over Marsha Ann Felton.

57. Plaintiffs were damaged by Marsha Ann Felton, Double H Realty, Inc., and and (sic) Jean Hollandsworth as set forth in paragraph 45 herein, plus they suffered mental anguish, they were unable to enjoy life, and they were otherwise injured.

Wherefore, plaintiffs demand judgment against Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth for a fair, just and reasonable amount of damages, interest, and costs. Plaintiffs demand a trial by jury.

THIRD CAUSE OF ACTION-FRAUD BY MARSHA ANN FELTON

58. Plaintiffs incorporate by reference paragraphs 1-45 of the complaint by reference, as if fully set forth herein.

59. Marsha Ann Felton had prepared the purchase offer agreements attached hereto as Exhibits 5 and 6 and incorporated herein by reference as if fully set forth herein.

60. Marsha Ann Felton had Elizabeth A. Sedlock sign Exhibit 5, which was prepared the way Elizabeth A. Sedlock requested, and this induced plaintiffs to trust Marsha Ann Felton; Marsha Ann Felton induced Elizabeth A. Sedlock sign Exhibit 6 based on her representations that Exhibit 6 contained the language of Exhibit 5, insofar as that it was contingent upon her ". . . locating acceptable

housing. . . .", by materially and falsely claiming she had included the said contingency.

61. Plaintiffs relied upon Marsha Ann Felton, who is a licensed real estate agent, which was justified because of her preparing Exhibit 5.

62. Plaintiffs reasonably believe that Marsha Ann Flelton (sic) committed the fraud because of the prospects of collecting multiple commissions and she incorrectly believed the Romanaos (sic) would honor their agreement.

63. Marsha Ann Felton's fraudulent actions were wilful and malicious, wanton, or intentional.

64. Double H Realty, Inc., is liable to Elizabeth A. Sedlock for the fraud by Marsha Ann Felton under the theory of respondeat superior, as the activities of Marsha Ann Felton were as an employee of Double H Realty, Inc., Marsha Ann Felton's actions were within the scope of her employment, Double H Realty, Inc., selected and engaged Marsha Ann Felton in her employment, Double H Realty, Inc., paid Marsha Ann Felton compensation, Double H Realty, Inc., had the power to dismiss Marsha Ann Felton, and Double H Realty, Inc., had the power of control over Marsha Ann Felton.

65. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the fraud by Marsha Ann Felton under the theory of agency because omissions of Marsha Ann Felton were done within the scope of her duties, Marsha Ann Felton performed services for Jean Hollandsworth under an express or implied agreement, Marsha Ann Felton was subject to the control or right to control the manner and means of Marsha Ann Felton performing the services, and Marsha Ann Felton was acting within the scope of authority which were expressly or impliedly assigned to the agent by Jean Hollandsworth.

66. Jean Hollandsworth is liable to Elizabeth A. Sedlock for the fraud by Marsha Ann Felton under the theory of respondeat superior as the activities of Marsha Ann Felton were as an employee and/or agent of Jean Hollandsworth, Marsha Ann Felton's actions were within the scope of her employment, Jean Hollandsworth selected and engaged Marsha Ann Felton in her employment, Jean Hollandsworth paid Marsha Ann Felton compensation, Jean Hollandsworth had the power to dismiss Marsha Ann Felton, and Jean Hollandsworth had the power of control over Marsha Ann Felton.

67. Plaintiffs were damaged by Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth and as set forth in paragraph 45 herein, plus they suffered mental anguish, they were unable to enjoy life, and they were otherwise injured.

Wherefore, (plaintiffs) pray that the Court grant them a judgment against Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth for a fair, reasonable and just amount of compensatory damages, a fair, reasonable, and just amount of punitive damages, interest, and costs. Plaintiffs demand a trial by jury.

The trial court made the following conclusions of law:

1. The Court finds that no duty is placed upon a real estate salesperson to anticipate a breach of contract and to protect a customer from such breach. The Court finds that the plaintiffs alleged duty in this regard lacks the essential element of foreseeability.

2. The Court finds that parties to a real estate contract have a duty to read their contract and know what is in the documents they sign and if they fail to do so, they may not blame another. Southern v. Sine, 95 W. Va. 634, 643, 123 S.E. 436, 439 (1924). A party to a contract who signs the contract without first reading it does so at his or her own peril. Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982) "Failure to read a contract does not excuse a person from being bound by its terms." Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982).

3. The Court finds that the seller of real property is not relieved of his or her duty to read sales agreement by virtue of reliance on a relationship with the drafting real estate agency. Rhodes v. Perimeter Properties, Inc., 369 S.E.2d 332, 333 (GA App. 1988). Those who can read must read and that failure to read a document on the basis solely of reliance upon the advise of the real estate salesperson does not relieve an individual of his or her "ordinary duty" to read the sales agreement. See id. at 333.

4. The Court finds that Section 30-40-26(f) of the West Virginia Code requires that a licensee makes certain that all necessary terms and conditions of a real estate transaction are contained in any contract prepared by the licensee. West Virginia Code Section Symbol 30-40-26 (2006). Section 30-40-26(f) of the West Virginia Code must be read with the remainder of Article 30 of the West Virginia Code, including Section 30-40-5(a)-(b), which states that activities normally performed by a lawyer are not included in the capacity of a real estate salesperson. See West Virginia Code Section Symbol 30-40-5(a)-(b) (2006).

5. The Court finds that Section 30-40-26(f) of the West Virginia Code does not require a real estate salesperson to place any requested term or condition in a real estate contract, regardless of how impossible or impractical that term or condition may be.

6. The Court finds that West Virginia law does not impose a duty on a real estate salesperson to include in a contract a clause that has already been fulfilled, is no longer necessary, and that will provide no further protection of the requesting parties' interests. See West Virginia Code 30-40-5(a)-(b) (2006); West Virginia Code 30-40-26(f) (2006); Southern, 95 W. Va. At 643, 123 S.E.at 439; Reddy, 171 W. Va. 373, 298 S.E.2d 910; Rhodes, 369 S.E.2d at 333.

7. The Court finds that Plaintiffs' complaint regarding these defendants fails to state a cause of action upon which relief can be granted. Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., as a matter of law, did not breach any duty owed to Plaintiffs. The Court finds that these Defendants had no duty to anticipate a breach of contract by the Romanos order

(to) protect Plaintiffs from such breach. The Court finds that the Romanos breach was not foreseeable to these Defendants.

For the foregoing reasons, this Court GRANTS Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty's motion to dismiss and DISMISSES WITH PREJUDICE Plaintiffs claims against Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty because the Complaint fails to state a claim upon which relief may be granted and fails to assert an actionable breach of duty.

Pursuant to West Virginia Rule of Civil Procedure 54, this is a final decree from which an appeal lies.

Appellants will elaborate on this in the discussion of law to follow.

THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN LOWER TRIBUNAL

The trial court erred in dismissing the appellants' complaint against appellees herein. The case was dismissed by the trial court with language appropriate for a Rule 54 appeal.

POINTS AND AUTHORITIES RELIED UPON

CONSTITUTIONS:

United States Constitution, Fifth and Fourteenth Amendments

Article 3, § 10, of the West Virginia Constitution

STATUTES:

West Virginia Code § 30-40-5

West Virginia Code §30-40-26

CASES:

Cardinal State Bank, Nat. Ass'n v. Crook, 184 W.Va. 152, 399 S.E.2d 863 (W.Va. 1990)

Coberly v. Coberly, 213 W.Va. 236, 580 S.E.2d 515 (W.Va. 2003)

Edmiston v. Wilson, 146 W.Va. 511, 120 S.E.2d 491 (W.Va. 1961)

John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978)

Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (Ga. App. 1988)

DISCUSSION OF LAW

Standard of Review

Coberly v. Coberly, 213 W.Va. 236, 580 S.E.2d 515 (W.Va. 2003), held as follows:

> 1. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995).
>
> 2. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus Point 3, *Chapman v. Kane Transfer Company, Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977

John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157, 158-159 (1978), stated as follows:

> **For purposes of a motion to dismiss, the complaint is construed in the "light most favorable to the plaintiff[s]," and the allegations are taken as true. Since common law demurrers have been abolished, pleadings are now liberally construed so as to do substantial justice. W.Va. R.C.P. 8(f). The policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.** *United States Fidelity & Guaranty Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965). "
> (Bold face added)

The Trial Court Erred in Dismissing the Appellants' Complaint

This legal discussion could be summarized in this paragraph, but for the undersigned's fear that such might be inadequate or considered inadequate. First, the Romanos' wrong, which has been settled, was for them breaching their contract to sell appellants 339 Worley Avenue,

Clarksburg, West Virginia. Second, the appellees' wrong, which was lying to Elizabeth Sedlock to get her to sign a contract to sell 601 Indiana Avenue, Nutter Fort, West Virginia, was adequately pleaded under the theories of breach of contract, negligence, and fraud against the appellees and, giving the appellants all the inferences of the pleadings (without even considering the proposed supplementation/amendment the appellants pleadings), the pleadings are adequate to withstand a motion to dismiss. Third, if it is necessary to eliminate the parol evidence rule in the pleadings, the appellants specifically and adequately pleaded the elements of fraud along with respondeat superior against the appellees, which takes out the parol evidence rule, and, failing that, all the inferences of the pleadings supports that the execution of the July 5, 2004, falls into the mistake exception of the parol evidence rule.

The trial court made some factually incorrect findings of fact because appellants' complaint, which is to be taken as true, stated something different. Findings of facts 3, 4 and 5 need explored in more detail. They provided as follows:

> 3. On June 26, 2004, Ms. Sedlock and Mr. Banish entered into a contract to purchase another home. The contract entered into by Plaintiffs for the purchase of the 339 Worley Avenue house owned by David A. Romano and Cathy Joey Romano expressly conditioned the sale upon "buyers closing on the sale of their home at 601 Indiana Avenue, Nutter Fort, WV 26301 prior to the closing date on the 339 Worley Ave., Clarksburg, WV 26301." The offer made by Mr. and Mrs. Moyle to purchase Sedlock's home on Indiana Avenue had expired.
>
> 4. The Moyles executed a new offer to purchase Sedlock's Indiana Avenue home on July 5, 2004. The "contract for Sale and Purchase" of Sedlock's home on Indiana Avenue to Mr. and Mrs. Moyle, was drafted for Sedlock's approval. The prior contract's contingency regarding acceptable housing had been fulfilled. Plaintiffs had located acceptable housing and entered into a contract for its purchase. Plaintiffs' ability to obtain financing to purchase the Worley Avenue house was contingent upon Ms. Sedlock first selling her house located on Indiana Avenue. The contingency clause regarding locating acceptable housing was not included in the draft of the contract dated July 5, 2004.
>
> 5. Ms. Sedlock read the contract, inquired about the contingency's

absence, accepted as the contract as drafted, and executed the contract on July 5, 2004. Ms. Sedlock initialed and signed the contract acknowledging that she read and understood the provisions and agreed to sell her house at the price, terms, and conditions set forth, and she was not relying upon any oral statements or representations made by the Purchaser, a real estate broker, or agent that were not in the contract.

The third finding of fact omits that it was contingent upon Elizabeth Sedlock **"buying"** a home, as set forth in paragraph 16 of the complaint. This became all the more necessary because between June 26, 2004, and July 5, 2004, there had been enough information released by the Romanos after signing an agreement to sell 339 Worley Avenue, Clarksburg, WV 26301, to Elizabeth Sedlock, which was verified as true to and by Marsha Felton (by her contacting Beth Taylor, the Romanos' listing broker), that the contingency was necessary because of the lack of trustworthiness that the Romanos exhibited in the previous agreement to sell 339 Worley Avenue, Clarksburg, WV 26301, to a third party plus their words indicating they were going to repeat their behavior. Mr. Romano was not a person of his written word. The June 26, 2004, purchase agreement was clearly contingent on Elizabeth Sedlock selling her house at 601 Indiana Avenue, Nutter Fort, West Virginia, and it was contingent upon buying a home as specified in the June 26, 2004, purchase offer (also see paragraph 16 of the complaint, as to how locating in the expired March 29, 2004, agreement was being interpreted by Elizabeth Sedlock as buying).

The fourth finding of fact conflicts with appellants' complaint because it indicates, "The prior contract's contingency regarding acceptable housing had been fulfilled." This finding tries to cast the lying about the omission of the contingency as harmless error because of the June 26, 2004, agreement. However, the pleadings at paragraph 16 clearly state that Elizabeth Sedlock said prior to execution of the June 26, 2004, agreement told Marsha Felton any sale of 601

Indiana Avenue, Nutter Fort, WV 26301, was contingent upon her **"buying"** a home, which paragraph 16 states that Marsha Ann Felton acknowledged.

The fifth finding of fact indicates that Elizabeth Sedlock "inquired about the contingency's absence." First, this is factually inaccurate because she inquired about the inclusion and was falsely told it was included. Second, paragraph 21 of the complaint, which is to be taken as true on a motion to dismiss, represented it had the same provisions as the previous one of March 29, 2004, and Elizabeth Sedlock made reference to the other contingency of not being willing to sell her home, until after she had purchased 339 Worley Avenue, Clarksburg, West Virginia. Marsha Ann Felton said she understood. The findings of fact are inconsistent on this point with the complaint because they indicate that Elizabeth Sedlock knew about the absent contingencies on July 5, 2004, when she did not learn of such until August 18, 2004 (see paragraph 39 of the complaint). The appellants were not given the benefit of their complaint being true on a motion to dismiss, which is reversible error because this finding was critical to the granting of the motion to dismiss.

The trial court made conclusions of law. The undersigned will comment below each. The first conclusion of law by the trial court stated:

> 1. The Court finds that no duty is placed upon a real estate salesperson to anticipate a breach of contract and to protect a customer from such breach. The Court finds that the plaintiffs alleged duty in this regard lacks the essential element of foreseeability.

Paragraph 19 of the complaint shows that prior to the contract of July 5, 2004, that Marsha Ann Felton had personal knowledge that David Romano had previously reneged on honoring a purchase offer agreement concerning the sale of 339 Worley Avenue, Clarksburg, West Virginia.

She had a duty to protect appellants because a breach by David Romano was foreseeable.

The second conclusion of law by the trial court stated:

> 2. The Court finds that parties to a real estate contract have a duty to read their contract and know what is in the documents they sign and if they fail to do so, they may not blame another. Southern v. Sine, 95 W. Va. 634, 643, 123 S.E. 436, 439 (1924). A party to a contract who signs the contract without first reading it does so at his or her own peril. Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982) "Failure to read a contract does not excuse a person from being bound by its terms." Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982).

Paragraph 21 of the complaint shows Marsha Ann Felton represented the contingency provisions were in the purchase offer agreement and that she acknowledged that Elizabeth Sedlock had to complete the purchase of 339 Worley Avenue, Clarksburg, prior to selling 601 Indiana Avenue, Nutter Fort, West Virginia. This would support a fraud claim, that is alleged in the third cause of action, a negligence claim that is alleged in the second cause of action, and a breach of contract claim, that is alleged in the first cause of action. *Cardinal State Bank, Nat. Ass'n v. Crook*, 184 W.Va. 152, 399 S.E.2d 863 (W.Va. 1990), held as follows:

> 1. "Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration." Syllabus Point 1, *Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947).

Marsha Ann Felton was twice told by Elizabeth Sedlock about the need for protection from the Romanos reneging on the sale of their residence before Elizabeth Sedlock sold her residence (see paragraphs 19 and 21 of the complaint), which would have left Elizabeth Sedlock without a home. After the breach by the Romanos, Marsha Ann Felton said to Elizabeth Sedlock that she knew the

contingencies were to have been in the purchase offer agreement of July 5, 2004, (Exhibit 8 attached to the complaint) (see paragraph 39 of the complaint). This allegation would support all three theories (i.e., breach of contract, negligence, and fraud) alleged in the appellants' complaint.

Additionally, there may be a mutual mistake of fact between Elizabeth Sedlock and Marsha Ann Felton. The parol evidence rule would not prohibit the testimony. See Syllabus Points 3 and 4 of *Edmiston v. Wilson*, 146 W.Va. 511, 120 S.E.2d 491 (W.Va. 1961), which held as follows:

> 3. Parol evidence is admissible to establish a mutual mistake in a deed or other written instrument.
>
> 4. Parol evidence to establish and correct a mutual mistake of fact and an unambiguous written instrument is admissible not by virtue of an exception to the parol evidence rule but because that rule does not apply to or preclude the admission of such evidence for that purpose.

The third conclusion of law by the trial court stated:

> 3. The Court finds that the seller of real property is not relieved of his or her duty to read sales agreement by virtue of reliance on a relationship with the drafting real estate agency. Rhodes v. Perimeter Properties, Inc., 369 S.E.2d 332, 333 (GA App. 1988). Those who can read must read and that failure to read a document on the basis solely of reliance upon the advise of the real estate salesperson does not relieve an individual of his or her "ordinary duty" to read the sales agreement. See id. at 333.

Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332, 333 (GA App. 1988), has the exact exception to their rule for fraud and misrepresentation, which are set forth in paragraphs 58-67 of the complaint. *Rhodes* states at page 56 as follows:

> Assuming there existed between the appellant seller, *Rhodes*, and the appellee realtors such a confidential or fiduciary relationships as entitled *Rhodes* to rely absolutely upon the accuracy of the contract drawn up for him and the buyer by the appellee realtors, or entitled him to rely upon its compliance with his directions (see OCGA § 23-to-53); and generally *Cochran v. Murrah*, 235 Ga. 304, 305 (19 S.E.2d 421); *Orson v. Roberts*, 195 Ga. 45 (23 S.E.2d 164)),

nevertheless, there was no evidence of suppression, concealment or misrepresentation by third parties in this case. This is not a case where the fiduciary is accused of fraud by intentionally concealing a fact for the purpose of obtaining an advantage or benefit. See *Georgia Real Estate Comm. v. Brown*, 152 Ga. App. 323, 324-325 (262 S.E.2d 596). In a case involving a fiduciary duty to disclose, an allegation of constructive fraud, which may be consistent with innocence and arises in legal fiction only by virtue of the relationship and the consequent high duty, should still require at least some degree of misrepresentation or bad faith. See *Gaultney v. Windham*, 99 Ga. App. 800, 805 (109 S.E.2d 914). The rule in this state is that he who can read must read; failure to read a document on the basis solely of reliance upon the fiduciary or other special duty of the other party, may be excused as between the parties themselves (see *Van Den Berg v. Northside Realty Association*, 172 Ga. App. 591 (323 S.E.2d 839)); **but where there is no evidence of suppression, misrepresentation or concealment or bad faith so as to impute moral guilt**, the mere omission of a matter from a document coupled with the failure to reveal the omission, can hardly be even constructive fraud unless it is "contrary to good conscience." OCGA § 23-to-51(b). (Bold face added).

The fourth conclusion of law by the trial court stated:

4. The Court finds that Section 30-40-26(f) of the West Virginia Code requires that a licensee makes certain that all necessary terms and conditions of a real estate transaction are contained in any contract prepared by the licensee. West Virginia Code Section Symbol 30-40-26 (2006). Section 30-40-26(f) of the West Virginia Code must be read with the remainder of Article 30 of the West Virginia Code, including Section 30-40-5(a)-(b), which states that activities normally performed by a lawyer are not included in the capacity of a real estate salesperson. See West Virginia Code Section Symbol 30-40-5(a)-(b) (2006).

West Virginia Code § 30-40-26 states as follows:

Every broker, associate broker and salesperson owes certain inherent duties to the consumer which are required by virtue of the commission granting a license under this article. The duties include, but are not limited to:

(a) At the time of securing any contract whereby the broker is obligated to represent a principal to a real estate transaction, every licensee shall supply a true legible copy of the contract to each person signing the contract.

(b) Any contract in which a broker is obligated to represent a principal to a real estate transaction shall contain a definite expiration date, and no provision may be included in any contract whereby the principal is required to notify the broker of his or her intention to cancel the contract after the definite expiration date.

(c) No provision may be inserted in any contract for representation that

would obligate the person signing the contract to pay a fee, commission or other valuable consideration to the broker, after the contract's expiration date, if the person subsequently enters into a contract for representation with a different broker.

(d) Every licensee shall disclose in writing, on the notice of agency relationship form promulgated by the commission, whether the licensee represents the seller, the buyer or both. The disclosure shall be made prior to any person signing any contract for representation by a licensee or a contract for the sale or purchase of real estate.

(e) Every licensee shall promptly deliver to his or her principal, every written offer received.

(f) Every licensee shall make certain that all the terms and conditions of a real estate transaction are contained in any contract prepared by the licensee.

(g) At the time of securing the signature of any party to a contract, the licensee shall deliver a true copy of the contract to the person whose signature was obtained.

(h) Upon the final acceptance or ratification of any contract, the licensee shall promptly deliver a true copy to each party that has signed the contract.
Acts 2002, c. 245, eff. March 5, 2002.
(Bold face added)

The agency disclosure showed that the appellees were representing the appellants. Paragraph 17 of the complaint alleges the following occurred:

> 17. Between June 26, 2004, and July 1, 2004, Marsha Ann Felton at the request of Joann E. Moyle and Thomas L. Moyle contacted Elizabeth A. Sedlock and requested that she agree to sell 601 Indiana Avenue, Nutter Fort, WV 26301, regardless of whether or not the sale was consummated for 339 Worley Avenue, Clarksburg, WV 26301, but Elizabeth A. Sedlock declined to do such.

This seemed innocent enough at the time the complaint was filed. However, on April 20, 2007, appellants' deposition of Thomas Moyle revealed the basis for adding paragraph 13.1, which is proposed to state as follows:

> 13.1 Thomas L. Moyle told Marsha Ann Felton that unless the 'finding suitable house contingency' was removed from Exhibit 5, that he would not be interested in signing another purchase offer agreement for the realty of Elizabeth A. Sedlock at 601 Indiana Avenue, Nutter Fort, WV 26301.)

The allegations clearly have shown that all provisions were not included in the complaint, which Marsha Ann Felton admitted, which makes such the basis for a negligence claim for the omission or a breach of contract claim and breach of fiduciary claim; however, if such omission was for the purpose of deceiving Elizabeth Sedlock and satisfying the Moyles and obtaining a commission from the sale for Marsha Ann Felton, then such would be a basis of a fraud claim, which are inferences that can be drawn from the complaint, as it is proposed to be supplemented/amended.

West Virginia Code §30-40-5(a-b) provides as follows:

> (a) The practice of real estate brokerage includes acting in the capacity of a broker, associate broker or salesperson as defined in section four of this article.
>
> (b) The practice of real estate brokerage does not include the activities normally performed by an appraiser, mortgage company, lawyer, engineer, contractor, surveyor, home inspector or other professional who may perform an ancillary service in conjunction with a real estate transaction.

The firth conclusion of law by the trial court stated:

> 5. The Court finds that Section 30-40-26(f) of the West Virginia Code does not require a real estate salesperson to place any requested term or condition in a real estate contract, regardless of how impossible or impractical that term or condition may be.

There have been no cases decided under this section of the statute cited. Paragraph 39 shows that this was a case where Marsha Ann Felton previously put contingency language and falsely represented there was a "buying" contingency in the agreement dated July 5, 2004, in favor of Elizabeth Sedlock. This finding of law would not be applicable to the case at bar because Marsha Ann Felton demonstrated on the purchase offer agreement dated the 29th day of March, 2004, on the purchase offer agreement dated the 26th day of June, 2004, and the purchase offer agreement dated the 5th

day of July, 2004, that she was capable of filling in paragraph 12 of the agreement titled "Additional Terms and Conditions."

The sixth conclusion of law by the trial court stated:

> 6. The Court finds that West Virginia law does not impose a duty on a real estate salesperson to include in a contract a clause that has already been fulfilled, is no longer necessary, and that will provide no further protection of the requesting parties' interests. See West Virginia Code 30-40-5(a)-(b) (2006); West Virginia Code 30-40-26(f) (2006); Southern, 95 W. Va. At 643, 123 S.E.at 439; Reddy, 171 W. Va. 373, 298 S.E.2d 910; Rhodes, 369 S.E.2d at 333.

This finding of law is wrong because the contract had not already been fulfilled. It was still necessary. It provided protection to the appellants.

The seventh conclusion of law by the trial court stated:

> 7. The Court finds that Plaintiffs' complaint regarding these defendants fails to state a cause of action upon which relief can be granted. Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., as a matter of law, did not breach any duty owed to Plaintiffs. The Court finds that these Defendants had no duty to anticipate a breach of contract by the Romanos order protect Plaintiffs from such breach. The Court finds that the Romanos breach was not foreseeable to these Defendants.

This finding of law is not applicable to the case at bar because the plaintiff's complaint properly sets forth a cause of action for breach of contract, a cause of action for negligence, and a cause of action for fraud against the appellees. The Romanos breach was for their failure to sell 339 Worley Avenue, Clarksburg, WV 26301, to the appellants. The appellees actionable action was Marsha Ann Felton breach of contract, negligence, and/or fraud in failing to include provisions in the July 5, 2004, agreement concerning 601 Indiana Avenue, Nutter Fort, WV 26301. At this juncture in the proceedings, the allegations in the complaint are taken as true.

In the case at bar, the appellants contend, which at this juncture must be considered true, that appellants wanted the "buying" contingency included, Marsha Ann Felton knew it, Marsha Ann Felton represented it was included, Marsha Ann Felton failed to include it, and Marsha Ann Felton admitted she failed to include it. Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., were licensees, who admitted in their motion to dismiss that Marsha Ann Felton prepared the contracts in dispute, violated W. Va. Code, § 30-40-26 (f) quoted above, which was a duty owed to Elizabeth Sedlock that appellees failed to do.

Article 3, § 10, of the West Virginia Constitution, which provides as follows:

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

This is similarly provided in the Fifth and Fourteenth Amendments to the United States Constitution.

RELIEF PRAYED FOR

Appellants pray that this Honorable Court reverse the decision of the Circuit Court of Harrison County and remand the case back to the Circuit Court of Harrison County.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings a record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 12th day of October, 2007, as set forth below:

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CHARLESTON WV 25305

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HARRISON COUNTY COURTHOUSE
310 W MAIN ST
CLARKSBURG WV 26301
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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELIZABETH A. SEDLOCK and
JASON BANISH,
Plaintiffs,

vs. CIVIL ACTION NO. 06-C-370-2

THOMAS MOYLE, JOANN MOYLE
MARSHA ANN FELTON,
JEAN HOLLANDSWORTH,
DOUBLE H. REALTY, INC.,
which is a West Virginia corporation,
DAVID A ROMANO and
CATHY JOEY ROMANO
Defendants.

SUPPLEMENTAL DESIGNATION OF RECORD

Please take notice that the undersigned on or about February 23, 2007, which certificate of service mistakenly said 2006, designated the entire record. Since the petitione for appeal was submitted, plaintiffs have filed with the Circuit Clerk of Harrison County, West Virginia, on or about the 25th day of July, 2005, a certified transcript of the videotaped deposition of Jean Hollandsworth that was taken on the 7th day of May, 2007, was filed with the Circuit Court of Harrison County, West Virginia, on the 25th day of July, 2007, and a copy of the typed statement of Marsha Ann Felton that was produced at the deposition on behalf of Jean Hollandsworth and/or Double H. Realty, Inc., plus a certified transcript of the videotaped deposition of Thomas Moyle that was taken on the 20th day of April, 2007, was filed with the Circuit Court of Harrison County, West Virginia, on the 25th day of July, 2007. Plaintiffs hereby request that the originals or copies, whichever is normally sent to the West Virginia Supreme Court of Appeals, of the two depositions and the typed statement of Marsha Ann Felton be forwarded to the West Virginia Supreme Court of Appeals.

Elizabeth A. Sedlock and
Jason Banish
By Counsel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings a record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 12th day of October , 2007.

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